WOH HUP (PTE.) LTD. & ANOR. v. TURNER (EAST ASIA) PTE. LTD.

[A.C.J. (Chua J.) January 14, 1986]

[Singapore – Suit No. 3599 of 1985]

Contract – Building subcontract – Payment withheld by employer – Defendants rescinding main contract with employer – Determination of subcontract – Claim by plaintiffs – Application for summary judgment against defendants – Defendants' application for stay of proceedings pending arbitration – R.S.C. 1970, O.14, r.1 – Arbitration Act (Cap. 16), s.7.

Building Contract – Subcontract – Employer withholding payment – Defendant rescinding main contract – Determination of subcontract.

These three appeals arising out of the claims by the plaintiffs, joint venture companies, against the defendants for sums due under a building subcontract totalling some $23 million, are against the decisions of the Senior Assistant Registrar. The defendants were building contractors engaged as the main contractors for the construction of a development known as the Gateway Project and their employer under the main contract was Gateway Land Pte. Ltd. (the employer). The plaintiffs' accepted tender sum for the subcontract works was some $45 million. The dispute arose when the defendants informed the plaintiffs that the amount payable under certificate No. 18 issued by the Architects dated December 14, 1984, had been withheld from the defendants by the employer and that as soon as the defendants had received the amounts due from the employer they would forward to the plaintiffs the amounts certified by the Architects. By another letter dated January 19, 1985, the defendants informed the plaintiffs that they had formally rescinded the main contract on January 18, 1985. Consequently, the subcontract was determined with effect from January 18, 1985.

In April, 1985, the plaintiffs commenced the present proceedings against the defendants. In May, 1985, the plaintiffs applied for summary judgment for some $23 million, and the defendants applied for stay of further proceedings pursuant to section 7 of the Arbitration Act. The Senior Assistant Registrar made no order on the application for summary judgment and, on the defendants' application he ordered that all further proceedings be stayed pursuant to section 7 of the Arbitration Act on condition that the defendants furnish within 30 days from August 20, 1985, security in the form of a banker's guarantee for the sum of S$7.5 million, in default thereof judgment be entered for the plaintiffs in that sum. In the result, the plaintiffs appealed against both orders and the defendants appealed against the condition in the second order.

Held, setting aside the two orders of the Senior Assistant Registrar: (1) on the plaintiffs' application, final judgment be entered against the defendants for the sum of $4,519,181 and $700 costs. The balance of the plaintiffs' claim amounting to $16,949,572 be stayed pending arbitration;

(2) on the defendants' application, all further proceedings in this action relating to the balance of the plaintiffs' claim amounting to $16,949,572 be stayed pursuant to section 7 of the Arbitration Act, Chapter 16.

Cases referred to:

(1) *Ellis Mechanical Services Ltd.* v. *Wates Construction Ltd.* (1976) 2 Build. L.R. 57; [1978] 1 Lloyd's Rep. 33.

(2) *In re Bjornstad & Anor. and The Ouse Shipping Co. Ltd.* [1924] 2 K.B. 673.

The following cases were also cited in argument: *Derek Crouch Construction Co. Ltd.* v. *N. Regional Health Authority* 24 Build. L.R. 60; *Associated Bulk Carriers Ltd.* v. *Koch Shipping Inc.* 7 Build. L.R. 18; *Taunton-Collins* v. *Cromie* [1964] 1 W.L.R. 633; *In the Matter of an Arbitration between Eyre and The Corporation of Leicester* [1892] 1 Q.B. 136.

APPEALS IN CHAMBERS.

Giam Chin Toon for the plaintiffs.
Wong Meng Meng for the defendants.

Cur. Adv. Vult.

Chua J.: There are three appeals against the decisions of the Senior Assistant Registrar given on August 20, 1985. These appeals arise out of the claims by the plaintiffs against the defendants for sums due under a building subcontract totalling $23,150,331.00.

The plaintiffs are a joint venture firm engaged in the building works required in the construction of a development known as the Gateway project. The defendants were building contractors engaged as the main contractors for the construction of Gateway project development and whose employer under the Main Contract was Gateway Land Pte. Limited (the Employer). By a subcontract dated the November 2, 1983, (the Subcontract) supplemental to the Main Contract the plaintiffs agreed to carry out and complete the Subcontract Works in accordance with the Subcontract documents, upon the terms and conditions contained therein. The plaintiffs' accepted tender sum for the Subcontract Works was $45,620,000.00.

The Subcontract Works essentially comprised the following:

(a) Air Conditioning and Mechanical Ventilation Services;
(b) Electrical Services;
(c) Plumbing and Sanitary Services;
(d) Fire Services.

The plaintiffs duly commenced the Subcontract Works and proceeded with the same, receiving interim payments from the defendants from time to time. By letter dated January 3, 1985, the

defendants informed the plaintiffs that the amount payable under Certificate No. 18 issued by the Architects dated December 14, 1984, had been withheld from the defendants by the Employer and that as soon as the defendants had received the amounts due from the Employer they would forward to the plaintiffs the amounts certified by the Architects for payment to the plaintiffs. By letter dated January 19, 1985, the defendants informed the plaintiffs that they had formally rescinded the Main Contract on January 18, 1985, on the advice of their lawyers. By letter dated February 5, 1985, to the plaintiffs the defendants confirmed that the Main Contract had been determined. Consequently the Subcontract was determined with effect from January 18, 1985. In April 1985 the plaintiffs commenced the present proceedings against the defendants.

On May 2, 1985, the plaintiffs applied for summary judgment under Order 14 Rule 1 to be entered against the defendants for the sum of $23,150,331.00 and $700.00 costs. On May 8, 1985, the defendants applied for an order that all further proceedings in the action be stayed pursuant to section 7 of the Arbitration Act, the plaintiffs and the defendants having by the Subcontract agreed to refer to arbitration the matter in respect of which this action is brought, and for costs.

The two applications were heard together by the Senior Assistant Registrar and, after two days of hearing, on August 20, 1985, he made no order on the application of the plaintiffs for summary judgment under Order 14 Rule 1, and on the application of the defendants he ordered that all further proceedings in this action be stayed pursuant to section 7 of the Arbitration Act on condition that the defendants furnish within 30 days from August 20, 1985, security in the form of a banker's guarantee for the sum of S$7.5 million, in default thereof judgment be entered for the plaintiffs in that sum and that the costs of and occasioned by the action be reserved with liberty to the parties to restore the application.

The plaintiffs now appeal against both orders and the defendants appeal against the condition in the second order.

Application under Order 14 Rule 1

The plaintiffs say that their claim for summary judgment totalling $23,150,331.00 is made up as follows :-

(i) a sum of $1,822,724.00 which is the amount included in Certificate No. 18 issued by the Architects dated December 14, 1984;

(ii) a sum of $2,696,457.00 which is the amount included in Certificate No. 19 issued by the Architects dated January 15, 1985;

(iii) a sum of $2,007,012.00 due under their payment Application No. 20;

(iv) a sum of $16,624,138.00 due as costs of materials or goods properly ordered for the Subcontract Works.

The plaintiffs ask for summary judgment in respect of the claims under (i) and (ii). The plaintiffs are now prepared to have the claim under (iii) referred to arbitration on condition that sufficient security is ordered to be furnished. As regards the claim under (iv) the sum is now reduced to $14,942,560.00 as two suppliers have settled their claims with the plaintiffs and the plaintiffs are now prepared to have the claim referred to arbitration on condition that sufficient security is ordered to be furnished.

The plaintiffs submit that their claim for summary judgment is in respect of sums which are indisputably due to them now, sums to which there can be no dispute.

It is useful to give the background facts. The plaintiffs are Mechanical & Electrical specialist subcontractors. The plaintiffs' works commenced in the middle of 1983, before the Subcontract documents were signed and the Subcontract ran its normal course until the end of 1984. The plaintiffs made application for payment on "Progress Claim" forms. These were valued by the services engineers named in the Subcontract, J.R. Preston & Partners Pte Ltd (the Engineers). The Engineers' valuations were in turn submitted to the appointed quantity surveyors, Rider Hunt Levett and Bailey (the Quantity Surveyors) who in turn would recommend payment to the architects – Chua Ka Seng and Partners (the Architects).

The Architects issued "Certificates of Payment" as the contract works proceeded which were honoured by the Employer and paid to the defendants who in turn paid the plaintiffs that portion of the certified sums which were due to them in respect of the Subcontract. The Certificates were in standard terms and attached to these were the Quantity Surveyors' Valuation Statements. All the forms were provided for in the Main Contract.

Everything went normally until Certificate No. 18 was issued on December 14, 1984. By that time a substantial dispute had arisen between the defendants and the Employer. After receipt of the notice of termination of the Main Contract the plaintiffs had to carry on work to finish off until the time they applied for payment under Application No. 20.

The plaintiffs' claims are for sums due under Clause 21 of the Subcontract which provides:

"DETERMINATION OF THE MAIN CONTRACT

If for any reason the Contractor's employment under the Main Contract is determined (whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise), then the employment of the Subcontractor under this Subcontract shall thereupon also determine and the Subcontractor shall be entitled to be paid:-

(i) The value of Subcontract Works completed at the date of such determination, such value to be calculated according to Clause 10 hereof.

(ii) The value of work begun and executed but not completed at the date of such determination, such value to be calculated according to Clause 10 hereof.

(iii) The value of any unfixed materials and goods delivered upon the Site for use in the Subcontract Works, the property in which has passed to the Employer under the terms of the Main Contract.

(iv) The cost of materials or goods properly ordered for the Subcontract Works for which the Subcontractor shall have paid or of which he is legally bound to accept delivery. On such payment by the Contractor any materials or goods so paid for shall become the property of the Contractor.

(v) Any reasonable cost of removal from the Site of his temporary buildings, plant, machinery, appliances, goods and materials."

The relevant provisions of Clause 10 read:

"SUBCONTRACT SUM – VALUATION OF VARIATIONS

(a) The price of the Subcontract Works (hereinafter referred to as "the Subcontract Sum") shall be the sum named in or determined by the provisions of part IV Appendix I to this Subcontract (and) such other sum as shall become payable by reason of any authorised variations or amount ascertained under Clause 8(h) hereof.

(b) The valuation of all variations authorised under Clause 7 hereof and all work executed by the Subcontractor in accordance with the instructions of the Contractor as to the expenditure of provisional sums or provisional items shall be determined by the Contractor and where such valuations shall require any measurement or remeasurement of the Subcontract Works the Contractor shall give to the . . Subcontractor an opportunity of being present at the time of such measurement and of taking such notes and measurements as the Subcontractor may require. Such valuation (unless otherwise agreed by the Contractor and Subcontractor) shall be in accordance with the following rules:-

(1) .....

(2) .....

(3) .....

(c) Any amount ascertained under the provisions of subclause (b) shall be added to or deducted from the Subcontract Sum."

The relevant provisions of Clause 8(h) read:

"(ii) If the regular progress of the Subcontract Works is materially affected by any act, omission or default of the Contractor, his servants or agents, or any subcontractors employed on the Works the Subcontractor shall as soon as such material effect becomes apparent give written notice thereof to the Contractor with details of any direct loss or expense thereby caused to the Subcontractor for the Contractor's evaluation and the Subcontract Sum shall be adjusted by the amount agreed upon between the Subcontractor and the Contractor."

The submission of the defendants is as follows:-

(1) Clause 21 has a condition precedent in that a valuation calculated according to Clause 10 is required before the plaintiffs are entitled to be paid and therefore the plaintiffs' claim is premature since such valuation has not been made.

(2) The amount of $1,822,724.00 is not payable because of Clause 11(b) of the Subcontract.

(3) The Architect's Certificates are not conclusive.

(4) Both the amounts allegedly due under Certificates Nos. 18 and 19 are the plaintiffs' own calculations. They have failed to account for the gross deduction of $2,840,000.00 from Certificates Nos. 18 and 19.

(5) The claim of $2,007,012.00 is without verification or certification of the Engineers or Architects.

(6) The claim under the suppliers' contracts need investigations as the goods may not be properly ordered.

(7) The defendants have a counterclaim in that:

(a) Materials have been removed by plaintiffs.

(b) No as-built drawings have been supplied.

(c) Work by the plaintiffs' subcontractors Fu Tsu were defective. (The defendants now concede that Fu Tsu were not the plaintiffs subcontractors).

There are actually no certificates for the sums of $1,822,724.00 and $2,696,457.00. The Certificates Nos 18 and 19 are certificates in which the

Architects certified a global figure for all monies which they considered fairly represented the amounts due to the defendants. The plaintiffs being one of the subcontractors would have their claims falling within the global certificates.

Mr. Wong, for the defendants, submits that the plaintiffs' case must fail or succeed on whether or not the condition precedent set out in Clause 21 has been fulfilled. He says the condition precedent is the valuation calculated according to Clause 10.

His argument is shortly this. Under Clause 21(i) it is provided that on the determination of the Main Contract the plaintiffs are entitled to be paid the value of the Subcontract Works completed at the date of such determination. How does one arrive at the value? It is to be found in the words "such value to be calculated according to Clause 10". The value of the Subcontract Works must be calculated according to the method or formula set out in Clause 10.

The heading of Clause 10 reads:

"Subcontract Sum – Valuation of Variations".

Mr. Wong says that on the face of it it seems to apply to variations but one has to look at the word "valuation" rather than the word "variations". This is because Clause 10(b) sets out a formula for the valuation of variations and if Clause 21 is applicable then Clause 10(b) is the valuation procedure that is envisaged under Clause 21 and is adopted for the purpose of valuing all the works. He, therefore, submits that the figures appearing under Certificates Nos. 18 and 19 are not figures valued according to Clause 10 and are not figures showing the true value of the works completed at the date of determination. As there has been no valuation done under Clause 21 the plaintiffs are not entitled to payment.

I am unable to accept Mr. Wong's submission. Clause 10 provides for the valuation of the entire Subcontract Works, including the calculation of the value of the authorised variations. Interim certificates are the valuation of work done on account of the subcontract sum and represent a valuation carried out in a manner consistent with Clause 10. Because Clause 10 provides a complete code for the valuation of the Subcontract Works including the valuation of authorised variations and amounts due under Clause 8(h) it is expressly referred to in Clause 21(i) and Clause 21(ii).

As Mr. Giam for the plaintiffs says Clause 21 does not talk of "valuation"; it says "Value of the Subcontract Works completed" which is different from "Valuation". Clause 21 says "to be calculated according to Clause 10" and not "in accordance with Clause 10". Works had already been done and it is not a case that the works had to be revalued on determination of the Subcontract as if they were variations. Nor is it a case that works had begun and executed but not completed and have to be valued as if they were variations.

In the present case the value of the Subcontract Works completed at the date of the determination of the Subcontract has already been calculated by the issue of Certificates Nos. 18 and 19.

Then Mr. Wong says that the Architects' Certificates are issued under Clause 11 and that by Clause 11(b) the defendants are under obligation to pay the plaintiffs only fourteen days after the defendants themselves have been paid by the Employer, and that, since the defendants have not been paid, the plaintiffs are not entitled to be paid under the Architects' Certificates.

I don't think Mr. Wong's argument is correct.

Under Clause 11(a) the defendants apply to the Architects for certificate of payment, which certificate will include the total value of the Subcontract Works done plus variations authorised and executed plus the amounts ascertained under Clause 8(h)(i) plus 75% of the value of materials and goods delivered upon the site for use in the Subcontract Works plus 75% of the value of off-site materials and goods for use in the Subcontract Works.

Clause 11(b) provides that within fourteen days of the receipt by the defendants of any interim payment from the Employer the defendants shall notify and pay to the plaintiffs "the value in respect of the Subcontract Works and in respect of any authorised variations thereof and amounts ascertained under Clause 8(h) hereof" less retention money and the amounts previously paid.

Clauses 21(i) and (ii) simply provide calculations according to Clause 10, which means in a manner consistent with Clause 10. That means that in the case of determination of the Subcontract not the full subcontract sum is payable but only the value of the works up to the point of determination. Interim certificates are the result of the valuation of the works executed up to a point on

account of the subcontract sum and such valuation is necessarily carried out in a manner consistent with Clause 10. Clause 10 provides a complete code of valuation of the subcontract sum including the valuation of variations and it provides the machinery for valuation by the Architects when they issue interim certificates. The interim certificate is not issued under Clause 11 but under the Main Contract. The plaintiffs are not claiming under Certificates Nos. 18 and 19 but they are evidence of the amounts due to them under Clause 21 as the value of the works that had been done. It is therefore wrong to say that the Certificates were issued under Clause 11 as if they were valued differently and that only when the defendants are paid will the plaintiffs be paid. The interim certificates are issued according to the valuation method set out in Clause 10 and that is concrete evidence that works worth that amount has been done up to that date.

In the case of determination of the Subcontract there is a lapse of time between the last certificate and the date of determination when work was carried out by the plaintiffs. The plaintiffs have in fact done more work after the last certificate up to the date of determination. This amount has not been calculated by the Architects as yet but the two sums claimed by the plaintiffs are indisputably due. The plaintiffs are entitled under Clauses 21(i) and (ii) to be paid those sums.

The question that next arises is should judgment be given for the plaintiffs in the sums of $1,822,724.00 and $2,696,457.00.

Mr. Giam urges me to follow the case of *Ellis Mechanical Services Ltd.* v. *Wates Construction Ltd.*[1] and order that final judgment be entered against the defendants for the sums of $1,822,724.00 and $2,696,457.00.

Ellis' case concerned a big building project at the old Hendon Aerodrome. Two local authorities, The Greater London Council and The Barnet Council, combined in it. GLC were to build a large number of dwelling houses for individuals to occupy and the Barnet Council were to build a comprehensive school and other buildings for the use of the community as a whole. Each of those two local authorities employed Wates Construction Ltd. as the main contractors for each of the contracts. Wates Construction Ltd. in their turn employed as subcontractors Ellis Mechanical Services Ltd. Ellis were to provide the heating system and all the mechanical services which were required for both the contracts. The main contract between GLC and Wates granted in June 1970 was for an estimated sum of £9½ million. The subcontract with regard to that by Wates to Ellis was for over £1 million. The work went ahead; but on the February 22, 1974, the Wates and GLC contract was determined. It came to an end, each of the two parties saying that the other had repudiated it. That was no concern of Ellis except in so far as it entitled them to be paid.

The main contract and the subcontract were in the usual RIBA form with some slight variations, but on this main contract being determined, the subcontractors became entitled to be paid in accordance with Clause 21 of the subcontract (which is similar to Clause 21 of the subcontract).

Ellis had been doing the works to the order and under the supervision of the GLC architects. Certificates had been given by the GLC architects and engineers and interim certificates by the architects under the GLC were issued.

Ellis claimed four items: (i) the value of the subcontract works in so far as they had been completed at the date of determination; (ii) the value of the work begun and executed, but not completed; (iii) the value of the unfixed materials on the site, in which the property passed to the employer; and (iv) the cost of materials off-site ordered, for which the subcontractors had paid or been charged. Ellis asked for payment. Wates refused to pay.

Ellis sued for the sums due and proceeded under Order 14 for summary judgment. They did not claim for the whole amount. The master gave summary judgment for £52,437, being the retention money held in respect of Ellis' work and stayed the rest of the action pending arbitration. On appeal Kilner-Brown J. set aside the judgment for £52,437 and referred the whole matter to arbitration. Eills appealed to the Court of Appeal.

Lord Denning M.R. in the course of his judgment said (p. 60) :

> ". . . it is quite plain on clause 21 that the sub-contractor was entitled to be paid in effect for all the work they had done and all the materials they had there available at the date February 22, 1974."
> ....
>
> (p. 61) "There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the

court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it. If the court sees that there is a sum which is indisputably due, then the court can give judgment for that sum and let the rest go to arbitration, as indeed the master did here."

At page 62, after dealing with the argument of counsel for Wates, Lord Denning said:

"That is all very well; but, as all of us with experience of building and construction cases are aware, there is inevitably something due. In most cases it can be said with certainty that £x is due. In such a case the court gives judgment for the £x and gives leave to defend as to the balance. Otherwise it would mean that the builders and contractor could be kept out of a great portion of their money indefinitely by the employers simply saying "I want to investigate the accounts". The employer could force the builder into bankruptcy by saying that he wants to sort out the accounts. So the court does not allow a builder or contractor to be kept out of the whole of his money on such an excuse. It gives judgment for such sums as it is reasonably seen is due."

Lawton L.J. agreed with the judgment delivered by the Master of the Rolls and he said (p. 63):

"One of the perils of commercial life for sub-contractors in the building trade is that there may develop between the main contractor and the building owner a serious dispute which leads to one or other of them repudiating the main contract. When that happens the lifeblood of the building trade, namely money, stops. The sub-contractor finds himself without the periodic payments which he receives, subject to retention money, on the architect's certificate.

Under the form of contract used in this case, and used in many cases of this kind, all the sub-contractor can do is to look to the main contractor for payment for the work that he has done, and the materials he has supplied under clause 21 of that contract.

If the main contractor can turn round, as the main contractor has done in this case, and say "Well, I don't accept your account; therefore there is a dispute", that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties; he is deprived of his commercial lifeblood. It seems to me that the administration of justice in our courts should do all it can to restore that lifeblood as quickly as possible. One of the demerits of our system of justice is that in this class of case, because of our rules of procedure, an arbitration under a building contract of this size is likely to take years. For example, Mr. Keating said that the defendants would be entitled to have discovery of all the documents. Indeed they would. He said that they would be entitled to examine them and see what they could find from them; indeed they would. That would take a very long time and the delay might do injustice to the plaintiffs.

The courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the courts make a robust approach, as the master did in this case, to the jurisdiction under Order 14."

Bridge L.J. in his judgment said (p. 65):

"For my part I would hesitate to use the epithet "robust". That might be thought to imply that the court's approach to a case of this kind, because of the undoubted difficulties and injustices which can arise from the length of building arbitrations, ought to lean heavily in favour of the claimant builder or sub-contractor. To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the court that at least £x is presently due from the defendant to the plaintiff? If it is, then judgment should be given for the plaintiff for that sum, whatever x may be; and in a case where, as here, there is an arbitration clause, the remainder in dispute should go to arbitration.

The reason why arbitration should not be extended to cover the area of the £x is indeed because there is no issue, or difference, referable to arbitration in respect of that amount."

The effect of the judgment of the Court of Appeal was that judgment was entered for Ellis in the sum of £52,437 and the rest of the action was stayed and was referred to arbitration.

Following *Ellis'* case I am of the view that the plaintiffs are entitled to judgment in the sum of $1,822,724.00 and $2,696,457.00.

As to the third item of the plaintiffs' claim of $2,007,012.00, Mr. Giam says that would have resulted in Certificate No. 20 if the Main Contract had not been determined. He says that the plaintiffs would not pursue this claim for judgment as it has not been certified but he submits and asks for security to be furnished for 50% of the claim by a banker's guarantee.

As to the last claim for $14,942,560.00, which relates to goods and materials ordered for the Sub-contract Works and supplied by the plaintiffs' suppliers, Mr. Giam says that some of these goods on-site and off-site have already been certified under Certificates Nos. 18 and 19 and the plaintiffs are entitled to judgment. As to the goods and materials not certified, they were already ordered and the plaintiffs were legally bound to accept delivery.

Mr. Giam says that the plaintiffs are not asking for judgment for the $14,942,560.00 but submits that the Senior Assistant Registrar's decision ordering security amounting to 50% of the total claim under this head is a correct decision.

Mr. Wong in reply to Mr. Giam says this as regards the plaintiffs' third head of claim for $2,007,012.00. This is not an amount which falls into any certificate at all. It is an amount for which the plaintiffs have asked payment of as being the value of works done up to the date of their application. At the hearing before the Senior Assistant Registrar the plaintiffs reduced their claim for judgment to $947,605.00 and agreed that the balance be referred to arbitration. Now before me the plaintiffs are not asking for judgment for the entire sum and instead ask the defendants to provide security for the sum claimed.

As to the plaintiffs' last head of claim for costs of materials and goods ordered for the Subcontract Works, Mr. Wong has this to say. The claim is for $16,624,138.00 in the Statement of Claim and now reduced to $14,942,560.00 as two suppliers have settled their claims with the plaintiffs. This sum will probably be reduced further as there is evidence that plaintiffs are, quite properly, seeking to mitigate damages by trying to reduce their liabilities. If plaintiffs are successful in their negotiations with their suppliers then the sum claimed by the plaintiffs would be less than $14.9 million and would probably be reduced to an indeterminate sum.

Mr. Giam submits that the correct order to make on the plaintiffs' application under Order 14 is that judgment be entered against the defendants for the sum of $4,519,181.00 and $700.00 costs and that the defendants do have leave to defend the balance of the plaintiffs' claim amounting to $16,949,572.00 upon the condition that the defendants do furnish security by way of a banker's guarantee in the sum of $9,000,000.00, within 14 days from the date of the order, failing which the plaintiffs may be at liberty to enter final judgment against the defendants in the sum $9,000,000.00 and the defendant may defend the action as to the residue of the plaintiffs' claim.

Mr. Wong submits that the defendants should not be ordered to provide security as asked for by the plaintiffs. As to the plaintiffs' head of claim for costs of materials and goods ordered for the Subcontract Works, Mr. Wong says that the plaintiffs' claim is wholly unsubstantiated. Further, materials already ordered as at the date of determination have in all probability already been claimed by the plaintiffs in their application up to Application No. 20. The plaintiffs have not in these proceedings shown any documents which show the plaintiffs' liabilities to pay for the materials the value of which is now being claimed. It is clear that there is no certainty as to any amount that can be said to be indisputably due and that is why the plaintiffs quite rightly have not asked for judgment. There is no reason why the defendants should be asked to furnish security.

Mr. Wong says that the defendants have a counterclaim against the plaintiffs and one of the counterclaims is that the plaintiffs have removed materials from the site for which they had already been paid. A thorough investigation of what had been removed or what had not been removed is a matter for the arbitration and not for the Court.

Mr. Wong further says that the plaintiffs do not deny that there are triable disputes between the Employer and the defendants and these triable disputes also involve the plaintiffs and it is only a matter of degree as to the plaintiffs' involvement. He submits that the matter in dispute between the plaintiffs and the defendants should be referred to arbitration. In this case you have disputes involving different parties at different levels and if there are separate proceedings involving some of the parties and not the others there may be inconsistent findings of facts in the two tribunals of the same issues and that is a situation best be avoided. The defendants are proceeding in their arbitration against the Employer. The plaintiffs have not at any time before the Senior Assistant Registrar or before this Court contended that the defendants' defences and counterclaim are a sham. The furthest Mr. Giam has gone is to say that the defences and the counterclaim "raised so far are weak and shadowy". Even where the defences are shadowy the Court will grant conditional leave to defend where there is no arbitration clause but the Court should not impose conditions where it grants a stay of proceedings to allow the matter to go to arbitration. The Court's power to impose conditions for granting leave to defend is expressly provided for under Order 14 whereas under section 7 of the Arbitration Act (Cap. 16) no such power is provided at all.

There is substance in what Mr. Wong says. As to the third and fourth heads of claim of the plaintiffs, I am satisfied that the defendants are not throwing out vague and general allegations and that a thorough investigation need to be made. I

am of the view that these two heads of claim should go for arbitration and that there should be a stay of proceedings in respect of those two heads of claim.

Mr. Giam says that the defendants should be ordered to provide security in the sum of $9,000,000.00 in respect of these two heads of claim amounting to $16,949,572.00.

The Court's power to impose conditions when granting leave to defend is expressly provided for under Order 14. But where the Court grants a stay of proceedings under section 7 of the Arbitration Act no such power is provided at all.

Mr. Giam relies on *In re Bjornstad and Anor. and The Ouse Shipping Company, Limited.*[2] In that case two Norwegian subjects made contracts with an English shipbuilding firm for the purchase of four ships. Each contract contained an arbitration clause. The contracts are English contracts and the Norwegians have provided an agent in England on whom process may be served. They have dissolved partnership; and they desire to proceed to arbitration on the contract in England. The shipbuilders refuse to appoint any arbitrator and the Norwegians apply to the Court to appoint an arbitrator under section 5 of the Arbitration Act, 1889.

The master made an order appointing an arbitrator. The shipbuilders appealed and applied for an order that the purchasers should give security for costs. Talbot J. dismissed the appeal but gave leave to appeal to the Court of Appeal. It was held that on an application under section 5 of the Arbitration Act, 1889, to appoint an arbitrator the Court has a discretion whether it should or should not make the appointment and the Court has power to order security for costs of the arbitration.

That case does not help the plaintiffs. It is not a case of an application for judgment under Order 14 and furthermore the applicants in that case were foreigners out of the jurisdiction of the Court. If they were bringing an action they would as a matter of couse be ordered to give security for costs. The Court, therefore, refused to appoint an arbitrator until the necessary security was found.

The exercise of the jurisdiction to stay proceedings is discretionary, but if the Court is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement the Court will seldom refuse a stay (Vol 2 *Halsbury's* 4th Ed. para 555). No authority has been cited by Mr. Giam where a stay of proceedings was granted on condition that the defendant provide security for the sum claimed when the party seeking the arbitration was not a foreigner.

I am of the view that in this case the stay of proceedings should be granted without condition.

In the result I set aside the two orders of the Senior Assistant Registrar made on the August 20, 1985, and I make the following orders:-

(1) On the application of the plaintiffs in Summons-in-Chambers No. 4208 of 1985 – final judgment be entered against the defendant for the sum of $4,519,181.00 and $700.00 costs and the balance of the plaintiffs' claim amounting to $16,949,572 be stayed pending arbitration.

(2) On the application of the defendants in Summons-in-Chambers No. 4446 of 1985 – all further proceedings in this action relating to the balance of the plaintiffs' claim amounting to $16,949,572 be stayed pursuant to section 7 of the Arbitration Act, Cap. 16.

I will now hear the parties on the question of costs and ancillary orders.

Order accordingly.

Solicitors: *Wee Swee Teow & Co.; Shook Lin & Bok.*

ONG MOH CHONG v. HITACHI CHEMICAL (S) PTE. LTD.

[O.C.J. (Rajah J.) February 19, 1986]

[Singapore – Suit No. 212 of 1982]

Tort – Negligence – Worker injured in the course of employment – Whether a safe system of work was provided.

Labour Law – Duty of employers to provide a safe system of work – Worker injured in course of employment – Breach of statutory obligation.

Damages – Fingers – Amputation of 3 fingers – Pain and suffering – Loss of future earnings – Quantum.

The plaintiff while working in the defendants' factory on a part-time basis as a machine operator was injured by